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National Specialties Installations, Inc. and Erin Hardcastle-Mehlhose. Case 7–CA–46698

January 18, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On August 16, 2004, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions, a supporting brief, and a motion to reopen the record and receive additional evidence. The General Counsel filed a cross-exception and supporting brief, an answering brief, and an opposition to the Respondent's motion.¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified.³

The General Counsel cross-excepted to the judge's ruling during the hearing that the General Counsel violated the Board's *Jencks* rule by failing to produce a July 12, 2003 notice sent to the discriminatees by their bank. See Board's Rules and Regulations § 102.118(b)-(d); see also *Jencks v. United States*, 353 U.S. 657, 667–672 (1957) (holding that a defendant has the right to inspect, for impeachment purposes, prior statements made to government agents by government witnesses). Although we find merit in the General Counsel's cross-exception, we do not disturb the judge's factual findings regarding the July 12 notice.

As a general matter, a written notice from a third-party bank to a witness will not be a "statement made by said witness" under the Board's rule. Board's Rules and Regulations § 102.118(d). Moreover, there is no evi-

dence that the notice in question was "adopted" by the discriminatees in a manner that would bring it within the rule. *Id.*; see also *Goldberg v. United States*, 425 U.S. 94, 110 fn. 19 (1976). We therefore find that the General Counsel did not violate the Board's *Jencks* rule.

Of course, a party's failure to produce a document on which it relies has long been recognized as a permissible basis for drawing an adverse inference that the document does not exist or that its contents would not be favorable to that party. See, e.g., *Mid States Sportswear, Inc.*, 168 NLRB 559, 560 (1967). The adverse inference rule is not mandatory, however; it permits, but does not require, drawing an adverse inference against the party that fails to produce the document. See *Champ Corp.*, 291 NLRB 803, 803–804 (1988), *enfd.* 933 F.2d 688 (9th Cir. 1990); accord *Overnite Transportation Co.*, 140 F.3d 259, 266 fn. 1 (D.C. Cir. 1998). Here, the judge found sufficient evidence to support an unfair labor practice finding, notwithstanding the failure of the General Counsel to produce the July 12, 2003 notice to the Mehlhoses from their bank. This testimony included credited testimony by Erin and Matthew Mehlhose that they received the notice, documentary evidence showing that their paychecks were in fact returned by the bank, testimony regarding "documents, deposition, and exhibits made a part of [related] civil litigation between the parties" and the passage of time since that litigation concluded, and evidence of the Respondent's overall problems with bouncing checks issued to the Mehlhoses and others. On the basis of the record evidence as a whole, we find that the judge properly declined to draw an adverse inference against the General Counsel for failing to produce the July 12 notice.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, National Specialties Installations, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

¹ We deny the Respondent's motion. The Respondent has not demonstrated extraordinary circumstances that would warrant reopening the record. Nor are we persuaded that the evidence the Respondent seeks to add would require a different result in this case. At best, it is merely cumulative of evidence already in the record. See Sec. 102.48 (d)(1) of the Board's Rules and Regulations.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We shall substitute the Board's standard language for par. 2(a) of the judge's decision.

⁴ We would not, however, rely on the judge's finding that the notice was "misplaced with no unlawful motive attached thereto." There is no basis in the record for such a conclusion. The Charging Party, Erin Mehlhose, testified that she provided the General Counsel with the notice during the investigation in the case. The General Counsel did not refute this testimony and did not adequately explain the whereabouts of the notice. While troubling, these matters need not form the basis for an adverse inference, given the other record evidence supporting the judge's finding that there was a notice that was received by the Mehlhoses.

“(a) Within 14 days from the date of this Order, offer Erin Hardcastle-Mehlhose and Matthew Mehlhose full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Erin Hardcastle-Mehlhose and Matthew Mehlhose whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge’s decision.”

Dated, Washington, D.C. January 18, 2005

Robert J. Battista, Member

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Richard F. Czubaj, Esq., for the Government*¹

*John D. Meyer, Esq., for the Company.*²

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. The parties presented evidence and gave closing arguments on July 13 and 14, 2004, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board’s (the Board) Rules and Regulations setting forth findings of fact and conclusions of law.

For the reasons stated by me on the record at the close of trial, specifically including credibility determinations, I found National Specialties Installations, Inc., (the Company) violated Section 8(a)(1) of the National Labor Relations Act, as amended, (the Act) by on or about July 14, 2003, discharging its employees Erin Hardcastle-Mehlhose and Matthew Mehlhose because they concertedly complained to Company President Michael Beydoun regarding their payroll checks being returned for insufficient funds. I concluded there was no credible evidence that the Company discharged Erin Hardcastle-Mehlhose for incompetence and that her husband Matthew Mehlhose voluntarily thereafter quit his employment.

I certify the accuracy of the portion of the transcript, as corrected,³ pages 177 to 196 containing my Bench Decision and I

attached a copy of that portion of the transcript, as corrected, as Appendix A.

CONCLUSIONS OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above, and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Company having discriminatorily discharged its employees Erin Hardcastle-Mehlhose and Matthew Mehlhose I shall recommend they, within 14 days from the date of the Board’s Order, be offered full reinstatement to their former jobs, or if their jobs no longer exist to substantially equivalent positions, without prejudice to their seniority, or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them with interest. I shall recommend the Company, within 14 days of the Board’s Order, remove from its files any reference to the discharge of Erin Hardcastle-Mehlhose and Matthew Mehlhose and within 3 days thereafter notify them in writing that this has been done and that their discharge will not be used against them in any manner. Back pay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following

ORDER

The Company, National Specialties Installations, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they concertedly complain to the Company regarding their payroll checks being returned for insufficient funds and in order to discourage employees from engaging in these or other concerted protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of the Board’s Order offer Erin Hardcastle-Mehlhose and Matthew Mehlhose reinstatement to their former jobs or if their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights or privileges enjoyed, and make them whole for any lost wages and benefits they suffered as a result of their discharge.

¹ I shall refer to counsel for the General Counsel as Government Counsel and the position he advocates as the Government’s position.

² I shall refer to the Respondent as the Company.

³ I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attachment Appendix C (omitted from publication).

(b) Within 14 days of the date of the Board's Order remove from Erin Hardcastle-Mehlhose's and Matthew Mehlhose's files any reference to their unlawful discharge and within 3 days thereafter notify them in writing this has been done and that their discharge will not be used against them in any manner.

(c) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, Social Security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of any back pay due under the terms of the Board's Order.

(d) Within 14 days after service by the Regional Director of Region 7 of the National Labor Relations Board, post at its Detroit, Michigan, facility copies of the attached Notice to Employees marked "Appendix B."⁴ Copies of the Notice, on forms provided by the Regional Director for Region 7 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to Employees, to all employees employed by the Company on or at any time since July 14, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 7 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated at Washington, D.C. August 16, 2004

BENCH DECISION

This is my decision in National Specialties, Installations Inc., herein the company, Case 7-CA-46698.

The government alleges the company by its president, Michael Beydoun, discharged its employees Erin Mehlhose, herein Erin Mehlhose, or Charging Party Mehlhose, and Matthew Mehlhose on or about July 14, 2003 because they concertedly complained to the company on that date regarding their payroll checks being returned for insufficient funds.

It is alleged company president Beydoun discharged the employees in question to discourage employees from engaging in these or other protected concerted activities.

The government alleges the company's actions violate Section 8(a)(1) of the National Labor Relations Act, as amended, herein Act.

On the entire record, including my observation of the witnesses and after considering opening and closing statements by government and company counsel, I shall make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The company is a corporation with an office and place of business in Detroit, Michigan where it is engaged in the construction industry as a commercial builder of gasoline stations.

During the calendar year ending December 31, 2002, a representative period, the company derived gross revenues in excess of \$500,000.00 and purchased and received at its Detroit, Michigan facility goods valued in excess of \$50,000.00 from other enterprises, including Redford Building Supply and Livonia Building Materials, each located within the State of Michigan, and each of which other enterprises had received these goods directly from points located outside the State of Michigan.

During this same time, the company in conducting its business operations provided services in excess of \$50,000.00 to various customers, each of which itself was directly engaged in interstate commerce.

The company admits and I find that at all times material herein it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

As noted, Michael Beydoun is president of the company and is an admitted supervisor and agent of the company within the meaning of Section 2(11) and 2(13) of the Act.

This case, as in most cases, requires credibility resolutions. In arriving at my credibility resolutions, may I state again that I carefully observed the witnesses as they testified and I have utilized such in arriving at the facts herein.

I have also considered each witness' testimony in relation to other witnesses' testimony and in light of the exhibits presented herein.

If there is any evidence that might seem to contradict the credited facts I have set forth, I have not ignored such evidence, but, rather, have discredited or rejected it as not reliable or trustworthy. I have considered the entire record

in arriving at the facts herein.

A bit more about the company. The company is a construction type business primarily building gasoline service stations. The company has been in business since the 1990's and is owned by its founder company President Beydoun. The company's workforce varies from a low of approximately 10 to 15 employees to a high of approximately 40 employees, depending on the number of projects the company has ongoing at any given time.

The company is housed in an approximately 25,000 square foot building with work space for various crafts, such as carpenters and masonry employees. The facility also has an office for company president Beydoun.

Matthew Mehlhose commenced working for the company at the end of May or early June, 2003 as a driver/operator. Mat-

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

thew Mehlhose, for example, operated a backhoe, a dozer and a loader at the company. Matthew Mehlhose obtained his job by responding to a newspaper advertisement by the company for a driver/operator.

Matthew Mehlhose learned company president Beydoun was needing someone to help him in the office with some computer problems. Matthew Mehlhose recommended company president Beydoun consider hiring his wife Erin Mehlhose to assist Beydoun with his computer problems.

Erin Mehlhose testified she faxed a resume and cover letter to the company and was hired on June 20, 2003 as a temporary From 1099 subcontractor for two days. Erin Mehlhose filled out an employment application dated June 30, 2003, showing a hire date as a regular employee effective June 20, Erin Mehlhose also filed the necessary W-4 forms at that time.

Erin Mehlhose who has a bachelor of arts degree from Wayne State University and is a licensed residential builder to testified various duties she performed for the company. Erin Mehlhose described herself as an assistant for company president Beydoun. She explained she generated payroll checks from the computer for Beydoun's signature and did scheduling, as well as projects for environmental concerns. Erin Mehlhose testified she also reviewed blueprints, specifically referring to blueprints for the Livonia Construction Projects. Erin Mehlhose testified she also noted changes made to the blueprints by the company's consultant firm A & M Consultants. Erin Mehlhose testified she also worked on financial statements company president Beydoun needed with regard to some special financing he needed for the purchase of a particular specialty type truck.

Erin Mehlhose testified that on Friday, July the 11th, 2003, coworker Sean Cross came into the office angry because his payroll check had been returned for insufficient funds. Cross wanted Erin Mehlhose to re-issue him a check that would replace the one that had bounced. Erin Mehlhose told Cross she could not issue or sign any replacement check.

According to Erin Mehlhose, employee John Sutherland was also concerned about his payroll check being returned for insufficient funds.

Matthew Mehlhose testified he worked on one of the company's projects on Saturday, July the 12th, 2003 because the owner of the property where the company was constructing a project did not believe work was progressing quickly enough.

On Saturday, July 12th, 2003, Erin Mehlhose testified she received word from her husband's bank that certain payroll checks of she and her husband's from the company was going to be returned for insufficient funds and the bank wanted to give them a heads up type notice that the checks were being returned and their personal bank account would be impacted accordingly.

The Mehlhoses testified they attempted to meet with company president Beydoun during the morning hours of July the 14th, 2003 to discuss the checks returned for insufficient funds, but that he declined, saying that he had too much work that needed to get done that morning.

According to the two, they met with company president Beydoun that afternoon to discuss the "bad" returned checks. They testified the meeting was long and that company president

Beydoun became angry and said he didn't like it. The Mehlhoses asked that the bounced checks be replaced by cash because they did not want to have the checks continuing to bounce. Beydoun declined to provide cash, insisting on any replacements being checks.

According to the two Mehlhoses, company president Beydoun brought out a gun, waved it about, and said that was the way things like this were handled in his country. According to the two Mehlhoses, company president Beydoun fired them both, stating I don't want either one of you working anymore for me. Matthew Mehlhose testified the gun company president Beydoun waved about was a 40 caliber semi-automatic weapon.

The Mehlhoses left, with Matthew Mehlhose returning on Friday, July the 16th, 2003 to turn in his company issued cell telephone.

Although a number of the checks that bounced were paid eventually, the Mehlhoses testified they were never paid in full for everything they were owed.

Erin Mehlhose testified company president Beydoun never at any time prior to her discharge criticized her work or complained about how she did things. Erin Mehlhose and company president Beydoun worked in close proximity to each other at the company.

Company president Beydoun testified he is the sole owner of the company and does everything related to the company, such as preparing bids for work, meeting with clients, inspectors, city officials for permit approvals, dealing with subcontractors, banks, and environmental officials. Beydoun testified he keeps his company financial operations and business very private and does not share that type of information with anyone, including his own family members.

Company president Beydoun testified his field manager and concrete specialist Amadora Camardo hired Matthew Mehlhose after Mehlhose responded to a help wanted newspaper advertisement placed by the company in early June, 2003.

Company president Beydoun testified Matthew Mehlhose referred his wife to the company as someone that could assist Beydoun with his computer problems at the company. Beydoun testified his regular secretary had taken the summer of 2003 off from work for an extended vacation and time with her family. Beydoun hired Erin Mehlhose at \$20.00 per hour and hired her just to help with his computer problems. Beydoun testified she continued to work for the company, performing various functions such as printing checks, preparing or attempting to prepare financial statements.

Company president Beydoun testified every project he gave Erin Mehlhose she would tell him she was on top of it, but never seemed to get the job done. Beydoun testified he spoke with Erin Mehlhose prior to her termination about her job performance.

Company president Beydoun specifically testified Erin Mehlhose never met with building inspectors, nor did she discuss or work with blueprints, nor did she relay or discuss blueprint changes brought out by his consultants A & M Consultants. Beydoun testified the only thing related to environmental type work that Erin Mehlhose performed was to pick up a pamphlet for him at an environmental agency.

Beydoun testified Erin Mehlhose was not an acceptable employee.

Company president Beydoun testified he spoke with Matthew Mehlhose on July 12th, 2003 about Erin Mehlhose because she was Matthew's wife and, presumably, he had some control over her. Company president Beydoun described Matthew Mehlhose as low class and Erin Mehlhose as high class.

Company president Beydoun testified he told Matthew Mehlhose on July 12th, 2003 that Erin Mehlhose was not to come back to work on Monday, July 14, 2003 because, 1, she had taken subcontractors into his office, 2, she had messed up his filings, and, 3, she had messed up his company's financial statement. According to Beydoun, Matthew Mehlhose answered that was okay with him, but what about his, Matthew Mehlhose's, continued employment with the company. Beydoun testified he told Matthew Mehlhose he could continue to work for the company.

Company president Beydoun testified he attempted to telephone Matthew Mehlhose on Sunday, July 13, 2003 to insure that Matthew Mehlhose had told Erin Mehlhose not to come to work on Monday. Company president Beydoun testified that, when he arrived at work on Monday, July 14, 2003, at around approximately 8:00 A. M., he saw Matthew Mehlhose's truck in front of the company building with Matthew and Erin Mehlhose screaming at each other.

Company president Beydoun testified that the Mehlhoses came into the building, with Erin, as usual, going to the restroom, and he spoke with Matthew Mehlhose. Company president Beydoun asked Matthew Mehlhose what she, Erin Mehlhose, was doing there, to which Matthew Mehlhose responded that he was afraid to tell her that Beydoun did not want her at work anymore. Beydoun told Matthew Mehlhose that he, Matthew, was needed on a job site and told him to come back that afternoon, that he would have to let Erin Mehlhose go.

Beydoun said he allowed Erin Mehlhose to be there that morning, but asked his two sons to work the computers so Erin Mehlhose would not have access to the company's computers.

Company president Beydoun testified he met with Erin and Matthew Mehlhose around 2:00 P. M., July 14th, 2003. Beydoun testified he told the two Mehlhoses that Erin Mehlhose had messed up his filings, his payroll and his financial statement, and had brought people into his office and she was going to have to go. According to Beydoun, Matthew Mehlhose responded by asking what about him. Beydoun told Matthew Mehlhose he had no problem with him, that he could continue to work. Matthew Mehlhose then asked if his wife could come back in the future. They then walked out.

According to Beydoun, nothing else was said and no mention was made of any payroll checks being returned for insufficient funds. Beydoun acknowledged he owns a 45 caliber Glock type gun, but denied he pulled it out or displayed it at the meeting.

Beydoun testified Matthew Mehlhose never thereafter returned to work at the company, although he, Beydoun, attempted to contact Matthew Mehlhose on Matthew's company cell phone for the next three days. Beydoun testified Matthew Mehlhose returned the company's cell phone on July 17, 2003 along with the key to the backhoe. Beydoun asked Matthew

Mehlhose why he never returned to work and Matthew Mehlhose responded his wife did not want him working for Beydoun anymore.

Company president Beydoun's brother-in-law testified that he observed Erin Mehlhose allow a job applicant into Company president Beydoun's office on one occasion and added that no one was ever to go into Beydoun's office unless Beydoun was there.

The company's cement specialist and field superintendent testified he saw a subcontractor sitting in company president Beydoun's office on one occasion when Erin Mehlhose allowed the subcontractor in.

Evidence was presented that the company eventually made good on the two Mehlhoses' bounced checks; however, it is still disputed as to whether the company still owes the two Mehlhoses any additional pay. I find it unnecessary, however, to discuss such discrepancies, if any, with respect to pay in order to resolve the issues herein.

Additionally, evidence was presented regarding some civil lawsuits involving liens filed by the Mehlhoses against company president Beydoun and others. Again, I find it unnecessary to explore the lien filings in order to resolve the issues herein.

The government's position in this case is simple. The government contends two employees, Matthew and Erin Mehlhose, spoke with management about wages and were discharged immediately for doing so.

The company's position is that Matthew Mehlhose was an excellent employee and voluntarily quit his employment after his wife Erin Mehlhose was terminated. The company's position with respect to Erin Mehlhose was that she was merely a secretary and not a very capable one who messed up every project she was given and was, accordingly, discharged.

The company's position is that Erin and Matthew Mehlhose never discussed wages with management prior to Erin Mehlhose's discharge and Matthew Mehlhose's voluntarily quitting.

At certain material times herein the company experienced a number, perhaps in the hundreds, of its checks being returned for insufficient funds. The evidence further establishes that Matthew and Erin Mehlhose submitted certain of their payroll checks, perhaps as many as three times, for payment. As I just mentioned, there has been civil litigation between the parties regarding liens placed on certain properties that grew out of the paycheck concerns.

Numerous documents, depositions, and exhibits were made a part of the civil litigation which has now been concluded. I make mention of the civil litigation and the documents therein only to note that the facts giving rise to this case took place approximately a year ago and various of the records pertinent to this case have been utilized in the civil case.

This case specifically turns on a resolution of the credibility of the witnesses.

The events of July the 14th, 2003 are described one way by the two Mehlhoses and in an entirely different way by company president Beydoun. There is no way to reconcile the two versions. This is not a case where the facts just differ slightly and you get two different versions. This is a case with certain criti-

cal points of which one side says took place, the other says it never happened.

I listened very carefully as the three key witnesses herein testified.

Erin Mehlhose impressed me as an articulate witness who was attempting to tell the truth as best she could. Erin Mehlhose responded well on cross-examination. She was sometimes a bit argumentative. Nevertheless, I'm persuaded it was not an effort on her part to misspeak the truth, but, rather, exhibited her strong belief in the accuracy of her testimony. While I'm persuaded she is a somewhat temperamental person or one who has a bit of a temper, such disposition did not in my opinion distract from her attempts to tell the truth. Erin Mehlhose on cross-examination answered more than she was asked, but, again, I'm persuaded it was an attempt to have the full sequence of events set forth, rather than any attempt on her part to mislead or misstate the facts.

Matthew Mehlhose testified in a very soft voice and at times on dates seemed a bit confused, but his overall demeanor exhibited truthfulness.

I credit the two Mehlhoses' testimony when it is in conflict with company president Beydoun's testimony. I specifically credit Erin and Matthew Mehlhose's testimony that her husband's bank gave her a notification that certain payroll checks paid to Matthew Mehlhose were going to be returned because the company's account had insufficient funds to cover it. I credit that testimony notwithstanding the fact that the specific letter referring to that was, perhaps, not produced in this proceeding. I'm persuaded that the number of exhibits that were presented in the civil case and that the length of time between the events in this case and the trial in this case that documents may well have been misplaced with no unlawful motive attached to them.

Knowing that, I am full persuaded that Erin Mehlhose did not go to the meeting on July the 14th, 2003 with her husband Matthew Mehlhose and meet with company president Beydoun, as is admitted, and then fail to say anything about the bouncing checks. Her disposition impresses me that she simply would not have remained quiet. She impresses me as a person who would speak up and I'm persuaded that she did at the meeting between she, her husband, and company president Beydoun.

Another factor that persuades me that the checks were discussed at the July 14th meeting is that it is admitted that the company was having problems with checks it issued bouncing and the Mehlhoses were having to submit checks two and three times for payment. That is, the same checks being submitted for payment.

With respect to company president Beydoun, he impressed me as an official in full control of his company and everything pertaining to his company. He even stated he did not share his company's internal business with anyone, that he ran the show completely. He wanted no one in his office. He didn't share his company business with other family members or, for that matter, even with his wife.

With that in mind, I'm persuaded he read his original affidavit in the civil lawsuit wherein he stated in that affidavit that he terminated both Matthew and Erin Mehlhose on July 14, 2003. He then comes to trial and states he did not read his original

affidavit in the civil suit until sometime later when he changed it to reflect that Matthew Mehlhose had quit, rather than being terminated.

That bit of testimony by company president Beydoun was very troubling for me. Specifically, when I evaluated it in light of the fact that this person so thoroughly runs his business, he has made the business what it is today single-handedly, I find it unbelievable that he would execute such a thing as important as an affidavit without reading it. That bit of information, although later changed or corrected by company president Beydoun, spoke volumes about his overall credibility in my opinion.

Looking at those facts then, the first question that must be asked as I apply the facts I have credited as testified to by the two Mehlhoses regarding their July 14th, 2003 meeting with company president Beydoun is was their actions and meeting concerted activity protected by the Act. That is, their meeting with company president Beydoun in discussing wages, did that constitute concerted activity and then activity that is protected by the Act.

The Board in *Meyers, M-e-y-e-r-s, Industries*, 268 NLRB 493 (1984) noted that the concept of concerted action has its basis in Section 7 of the Act. Section 7 of the Act in pertinent part states: "employees shall have the right to self-organization to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."

The Board pointed out in the first *Meyers* case that, although the legislative history of Section 7 of the Act does not specifically define concerted activity, it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal.

The statute requires that activities under consideration be concerted before they can be protected and not all concerted activity is protected activity.

The Board in the first *Meyers* case set forth the following definition of concerted activity: In general, to find an employee's activity to be concerted, we shall require that it be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found, if, in addition, the Employer knew of the concerted nature of the employees' activity, the concerted activity was protected by the Act, and the adverse employment action at issue was motivated by the employees' protected concerted activity."

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the evidence. Was the activity that Erin and Matthew Mehlhose engaged in concerted activity? I find it was. The two employees went to management two discuss or complain about their paychecks bouncing. The fact they were husband and wife does not detract from the concerted nature of their conduct because both were employees of the company.

Did the company know of the concerted nature of their activity? Yes. The company could not help but know of the concerted nature of their activities because the two employees met

specifically with the owner and founder of the company to discuss wages.

The key question: Was their concerted activity protected by the Act? In terms of working conditions, perhaps, no other item of employment is as important to employees as wages or, in this case, the lack of wages as a result of bouncing checks.

It is clear without question that, when Erin and Matthew Mehlhose met with Company president Beydoun on July the 14th to speak about the checks, they were engaging in concerted activity that is protected by the Act.

Did adverse action result against the two employees? Yes. They were terminated immediately and I'm persuaded as testified to by the two Mehlhoses that they were both terminated. They were told I don't want you here anymore, and they left.

Next I turn to the issue of did the company establish its affirmative defense that it would have taken the action it did even in the absence of any concerted protected activity on the two employees' part.

The company, in my opinion, failed to establish it would have taken the same action it did in the absence of any concerted protected conduct on the part of the two Mehlhoses. The credited evidence establishes company president Beydoun never discussed with Erin Mehlhose any job deficiencies, real or perceived, on her part prior to her discharge. I am fully persuaded the company had not expressed problems with Erin Mehlhose prior to her going with her husband, a fellow employee, to complain to company president Beydoun about employee payroll checks bouncing for insufficient funds.

I'm fully persuaded the reasons advanced by company president Beydoun for his discharge of Erin Mehlhose were merely after the fact rationalizations by him in an attempt to justify his actions or, at least, to obscure or hide his real reason for discharging the two employees.

I'm persuaded and find that the discharge of employees Matthew and Erin Mehlhose violated Section 8(a)(1) of the Act.

ORDER

I shall order that the company offer reinstate to the two Mehlhoses to their former jobs or, if their former jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed and the company shall make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them with interest.

The company shall expunge from its records any reference to their unlawful discharge and notify the two employees in question that such as been done.

I shall direct that the company post a notice, which I shall prepare and attach to my certification of this decision. The court reporter will provide to me a copy of the transcript and to the parties who request it, usually, within ten days of today or ten working days of today. Once she has done that, I will take the pages of the transcript that constitute my decision and make any necessary corrections thereon and then I will certify to the parties and the Board that this is my decision, and it is my understanding that, once I have certified my decision and the Board has transferred my decision to and continued it before the Board, that the period for appeal commences to run at that

point, but, for any parties wishing to take exceptions, please rely on the Board's Rules and Regulations as to when you are to timely file any appeal, rather than on my assessment of when it starts.

I can tell you clearly that I will certify the decision and issue that to the parties. There is nothing further that the parties can do in the interim before I have certified my decision because it is not my final decision until it is certified.

Let me state again that it has been a pleasure hearing this case and being in Detroit, Michigan and, with that, this trial is closed.

(Whereupon, at 8:45 A. M., the hearing in the above-entitled matter was closed)

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because they concertedly complain to us regarding their payroll checks being returned for insufficient funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Erin Hardcastle-Mehlhose and Matthew Mehlhose full reinstatement to their former jobs or if their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights or privileges previously enjoyed; and, WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the discharge of Erin Hardcastle-Mehlhose and Mathew Mehlhose, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharge will not be used against them in any manner.

NATIONAL SPECIALTIES INSTALLATIONS, INC.